KILPATRICK TOWNSEND
ATTORNEYS AT LAW

KILPATRICK TOWNSEND & STOCKTON LLP
www.kilpatricktownsend.com

Suite 900 607 14th St., NW
Washington DC 20005-2018
t 202 508 5800 f 202 508 5858

direct dial 202 824 1412
direct fax 202 315 3485
jdomike@kilpatricktownsend.com

January 27, 2012

VIA HAND-DELIVERY

The Honorable Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Petition for Stay of Interim Final Rule; Nonconformance Penalties for On-Highway Heavy Heavy-Duty Diesel Engines.

Dear Administrator Jackson,

On behalf of Mack Trucks, Inc. and Volvo Group North America, LLC (collectively "Mack"), we respectfully request a stay of the Environmental Protection Agency's ("EPA") *Interim Final Rule; Nonconformance Penalties for On-Highway Heavy Heavy-Duty Diesel Engines*[1], pending judicial review. This request is submitted pursuant to Federal Rule of Appellate Procedure 18, which requires that a party ordinarily move first before an agency for a stay pending review of a final rule. Given the urgency of this matter, we request a response within ten (10) days of the date of this letter. If no response is received, we will assume that EPA has denied Mack's request for a stay.

Background

On January 20, 2012, you signed an Interim Final Rule setting nonconformance penalties (NCPs) for heavy heavy-duty diesel engines manufactured in 2012 and 2013 ("Interim NCP Rule," pre-publication copy attached as Exh.1). The NCPs would be available for use in meeting the current 0.2 g/bhp-hr emission standard for nitrogen oxides (NOx), which took full effect in 2010. Simultaneously with the Interim NCP Rule, you signed a Notice of Proposed Rulemaking which proposed identical NCPs as the Interim NCP Rule, but would make those NCPs available in years following 2013. ("Proposed NCP Rule," or "NPRM," pre-publication copy attached as Exh. 2). Both the Interim NCP Rule and the

[1] As of the date of this letter, EPA's Interim NCP Rule had not been published in the *Federal Register*, It has been published on EPA's website at http://www.epa.gov/otaq/hd-hwy.htm., which indicates it was signed January 20, 2012.

Proposed NCP Rule include a public comment period that ends April 4, 2012. Notwithstanding the comment period, however, EPA has made the Interim NCP Rule "effective immediately" upon publication in the *Federal Register*. Interim NCP Rule, at 7.

As a result, EPA is adopting NCPs without providing the public with any notice of or opportunity for comment on the Interim NCP Rule, as required by Section 307(d) of the Clean Air Act ("CAA"), 42 U.S.C. §7607(d), and Section 553 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. Furthermore, by making the Interim NCP Rule effective upon publication, EPA fails to comply with APA § 553(d), 5 U.S.C. § 553(d), which mandates that rules not take effect until 30 days after publication in the *Federal Register*. As the basis for failing to follow the legally mandated rule-making requirements of the CAA and the APA, EPA cites the "good cause" exception of APA § 553(b)(B), and a narrow exception to the 30-day publication requirement provided under APA § 553(d). Interim NCP Rule at 7. Neither of these exceptions apply, however, as EPA lacks good cause to circumvent these vitally important statutory mandates. Moreover, by establishing an NCP rule that is not warranted and is set at a level that provides almost no incentive for noncompliant manufacturers to meet applicable standards, EPA has violated Congress' statutory mandate to protect both the environment and the competitive interests of manufacturers who spent substantial resources and effort to comply with the rules. Accordingly, Mack intends to seek judicial review of EPA's Interim NCP Rule pursuant to CAA § 307(b), 42 U.S.C. § 7607(b).

Facts Do Not Support Good Cause for The Interim NCP Rule

The Interim NCP Rule effectively relaxes emissions standards for a single manufacturer that were first adopted January 18, 2001, nearly 11 years to the date before you signed the Rule. Over the course of the 11 years since adoption of the current NOx standards, every manufacturer of heavy-duty diesel engines, save one, spent substantial money, effort and time successfully developing technologies that would enable their product to comply. Moreover, all manufacturers, save one, elected to develop engines using selective catalytic reduction ("SCR") technology – as it was commonly understood that this was the only technology proven capable and effective in meeting the standard. The one manufacturer which did not have an engine capable of meeting the 0.2 g/bhp-hr NOx standard when it took full effect in 2010, Navistar, Inc., elected to pursue a different technology in hopes of gaining a competitive advantage over the rest of the industry. Navistar made this decision, notwithstanding that it was party to numerous meetings between engine manufacturers and EPA during which it became abundantly clear that SCR was the only technology that would allow manufacturers to meet the standard by 2010. In other words, Navistar was fully aware of the risks associated with its technology choice, but pursued it anyway. More importantly,

Navistar had a proven and compliant technology available to it, which in fact it has chosen to use outside the U.S., but for solely economic reasons, elected not to pursue the proven technology in the U.S. and thus achieve compliance.

In early 2009, a full two years before EPA's adoption of the Interim NCP Rule, Navistar sued the agency seeking, in part, to repeal the 'new' standards finalized in 2001 on the basis that they are infeasible. *See Navistar v. EPA,* No. 09-1113 (petition filed March 31, 2009, D.C. Cir., copy attached as Exh. 3). As early as 2009, therefore, EPA was fully aware that Navistar was unable to produce an engine that could meet a 0.2 g/bhp-hr NOx standard using the technology it elected to pursue. Nonetheless, neither EPA nor Navistar elected to pursue an NCP rulemaking. In late 2009, Navistar sought to certify heavy-duty diesel engines to a 0.5 g/bhp-hr NOx standard using emissions credits under EPA's averaging, banking and trading ("ABT") program, as it still was unable to certify engines that could meet the applicable limit using its technology choice. At this time, EPA was again fully aware that Navistar could not meet the NOx standard, and would have to rely on a limited supply of emissions credits to certify its engines. Nonetheless, neither EPA nor Navistar elected at that time to pursue an NCP rulemaking. In short, EPA has been aware of Navistar's inability to meet the current NOx standards for years, but inexplicably was silent on the prospect of adopting an NCP until 2012 – more than a decade after the regulation was adopted and two years after it took full effect.

Despite the fact that it had ample notice and opportunity to propose and, if appropriate, adopt an NCP through the proper rulemaking process, EPA now seeks to adopt an unlawful and unjustified NCP Rule without giving the public, including Navistar's competitors, any opportunity to review and comment on the defective rule. EPA is fully aware that its rule is extremely controversial, will have potentially significant adverse impacts on Navistar's competition, and will result in significant, unwarranted, excess pollution. Under the totality of the circumstances, EPA's decision to circumvent the rulemaking process based on a narrowly construed and inapplicable exception to rule-making requirements under the CAA and APA is arbitrary, capricious, and not in accordance with the law.

Facts Do Not Support Interim NCP Rule

In addition to lacking good cause, EPA's Interim NCP Rule is fundamentally flawed, both with respect to EPA's determination that a technological laggard exists to justify the rule, and with respect to the level of penalties the Rule would impose. EPA's determination that a technological laggard exists is based solely on: (1) the existence of a manufacturer that is using credits to comply; (2) the failure of that manufacturer to submit an application for a

certificate of conformity that does not rely on credits to comply; and (3) representations by the manufacturer that it may run out of credits before the end of 2012. Interim NCP Rule at 8 – 9. This is not sufficient to justify a finding of a technological laggard, especially in this case.

Moreover, even if a technological laggard did exist, the extremely low penalty EPA adopted is arbitrary, capricious and not in accordance with the requirements of the Clean Air Act. The 2001 rule established an emission standard for NOx of 0.2 grams/ brake horsepower hour. The Interim NCP Rule, however, allows manufacturers to exceed this standard by up to 150 percent by complying with a NOx limit of 0.5 g/bhp-hr through payment of a maximum penalty of just $1,919 per engine. Interim NCP Rule at 15. By comparison, EPA's previous NCP rulemaking for heavy-duty diesel engines (which was adopted through proper notice and comment procedures) set an NCP of $12,210 for a manufacturer seeking to certify an engine with emissions 150 percent higher than the applicable standard. *See* "Regulatory Announcement, Nonconformance Penalties for Heavy-Duty Diesel Engines," August 2002, http://www.epa.gov/otaq/regs/hd-hwy/ncp/f02025.pdf. Comparing these two rules alone demonstrates that the penalty in the Interim NCP Rule is grossly insufficient. The remaining evidence regarding the costs incurred by SCR manufacturers in order to comply with the standard only bolsters this fact. This cost information was provided to EPA, but inexplicably ignored or disregarded by the Agency in setting the penalty in the Interim NCP Rule.

Factors Supporting Stay

There are four factors an agency must consider and balance in determining whether to stay a rule pending review. In this case, these are: (1) whether Mack is likely to prevail on the merits; (2) whether, absent a stay, Mack will suffer irreparable harm; (3) whether EPA or other interested parties will suffer irreparable harm from issuance of the stay; and (4) whether the public interest will be served by issuing the stay. *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009). In this case, all four factors support staying EPA's Interim NCP Rule.

1. Mack is Likely to Prevail on the Merits

Mack is challenging three aspects of EPA's Interim NCP Rule. First, Mack is challenging EPA's decision to issue the Rule as an Interim Final Rule without providing the public notice and opportunity to comment. Second, Mack is challenging EPA's finding that a technological laggard exists to justify the Interim NCP Rule. And third, even assuming

such a technological laggard does exist, Mack is challenging the level of the NCP established by EPA. For reasons set forth herein, Mack is likely to prevail on each of these points.

A. EPA Lacked Good Cause to Issue an Interim Final Rule

Both the CAA and the APA require EPA to provide a "notice and comment" period prior to finalization of any rule. 42 U.S.C. § 7607(d)(3); 5 U.S.C. § 553(b). EPA has failed to properly abide by the notice and comment procedures and has, instead, claimed that it is eligible for a limited exception to the requirements. EPA claims that the CAA and APA's notice and comment procedures are not required for the Interim NCP Rule because EPA has made a "good cause" determination "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Interim NCP Rule at 6-7 (citing to 5 U.S.C. § 553(b)(B)). While the APA does provide an exception to the notice and comment requirements at Section 553(b)(B) when an agency makes a "good cause" finding that the procedures are "impracticable, unnecessary, or contrary to the public interest," EPA's stated justification for bypassing the notice and comment provisions for the Interim NCP Rule falls well short of what is required to qualify for this exception.

EPA states that it considered four factors when determining that "good cause" exists to bypass the notice and comment procedures. EPA explains that these four factors are as follows:

1. Taking interim final action avoids the possibility that an engine manufacturer will be unable to certify a complete product line of engines for model year 2012 and/or 2013;
2. The Agency is only amending limited provisions in existing NCP regulations;
3. The Rule's duration is limited; and
4. There is no risk to the public interest in allowing manufacturers to certify using NCPs before the point at which EPA could make them available through a full notice-and-comment rulemaking.

Interim Rule at 6.

Controlling case law establishes that EPA's purported justifications for claiming the APA's "good cause" exemption are insufficient to justify the use of this limited exception. Courts have repeatedly emphasized that the "good cause" exemption is to be used sparingly and only in the case of real emergencies. *U.S. v Rainbow Family*, 695 F.Supp. 294, 304 (E.D. TX, 1988) (internal cites omitted) (an agency's proffered rationale of "good cause" for failing to observe the notice and comment period "should be 'closely examine[d]' by a reviewing court); *NRDC v. EPA*, 683 F.2d 752, 764 (3rd Cir. 1982) (circumstances justifying

the reliance on the "good cause" exception are "indeed rare" and will be accepted only after the court has "examined closely" the agency's proffered rationales).[2]

The burden of demonstrating good cause is on EPA. *Northern Arapaho Tribe v. Hodel*, 808 F.2d 741, 751 (10th Cir. 1987). Furthermore, as the Court in *Northern Arapaho Tribe* explained, the APA's legislative history shows that Congress intended the scope of the exception to be very limited:

> "'*Impracticable*' means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings. '*Unnecessary*' means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment in which the public is not particularly interested were involved. '*Public interest*' supplements the terms 'impracticable' or 'unnecessary;' it requires that public rule-making procedures shall not prevent an agency from operating, and that, on the other hand, lack of public interest in rule making warrants an agency to dispense with public procedure."

Id. (quoting from S.Rep. No. 752, 79th Cong., 1st Sess. 14 (1945) (emphasis added)). The *Northern Arapahoe* court also noted that "the exception should be narrowly construed because "[i]t is an important safety valve to be used where delay would do real harm. It should not be used, however, to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them." *Id.* (citing *United States Steel Corp. v. EPA,* 595 F.2d 207, 214).

The rationale offered by EPA for claiming the "good cause" exemption does not satisfy the requirements for the exemption. EPA has failed to provide any actual facts to justify the need for the departure from the mandated notice and comment procedures. *See Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1145- 46 (D.C. Cir. 1992)(Criticizing an agency for providing "little factual basis for its belief" that the exemption was necessary and finding the evidence of a company's impending violation of the then-existing rules to be "a

---

[2] Other courts have also held that the APA's statutory exceptions from notice and comment procedures must be "narrowly construed and reluctantly countenanced." *Mid–Tex Electric Cooperative v. FERC,* 822 F.2d 1123, 1132 (D.C.Cir.1987) (quoting *American Federation of Government Employees v. Block,* 655 F.2d 1153, 1156 (D.C.Cir.1981)); *U.S. Steel v. EPA,* 595 F.2d 207, 214; *Baylor University Medical Center v. Heckler,* 758 F.2d 1052, 1058 (5th Cir.1985). Still others have noted that "[a]s the legislative history clearly indicates, Congress was emphatic in its view that the exception for 'good cause' provided by §553 is to be read stringently." K. Davis, *Administrative Law Treatise,* § 6.29 at 124 (1984) (citing to S.Doc. No. 248, 79th Cong., 2d Sess. at 200 (1946) ("The exemption of situations of emergency or necessity is not an 'escape clause' in the sense that any agency has discretion to disregard its terms or the facts. A true and supported or supportable finding of necessity or emergency must be made and published.").

thin reed on which to base a waiver of the APA's important notice and comment requirements.") EPA claims that the exemption is needed because, in its opinion, "it is possible" that an engine manufacturer "may need" NCPs this model year. Interim NCP Rule at 6 (stating also that "we do not expect" the manufacturer to have enough credits to cover its production). These speculative assertions are not supported by any information and cannot form the basis for relying on the "good cause" exemption.

In addition, EPA has failed to explain why the normal notice and comment procedures are either "impractical, unnecessary or contrary to the public interest." EPA offers only unsupported conclusions and provides no adequate explanation as to what "emergency" situation compels its current action. Indeed, while the possibility of an engine manufacturer's future noncompliance can be relevant, it is only so if the facts demonstrate certain and severe noncompliance and if the agency is under a mandate to prevent such noncompliance. Here, EPA admits that Section 206(g) of the CAA "allows," but does not require, EPA to offer NCPs to manufacturers when faced with more stringent emission standards. Interim NCP Rule at 3. Therefore, EPA cannot claim that it is "impracticable" to abide by the APA's notice and comment procedures.

EPA does not make any attempt to claim that it is "unnecessary" to abide by the procedures, and its argument that it is not in the "public interest" to abide by such procedures is without merit. EPA states that there is "no risk to the public interest" in allowing the use of NCPs before the time when a proper rulemaking could be completed. Interim NCP Rule at 6-7. To support this assertion, EPA explains there is no risk of public harm because EPA could be wrong about its claim that manufacturers even need the NCPs and that, therefore, the NCPs might not be used at all. *Id.* This rationale is not only illogical, it also directly contradicts other assertions by the Agency with respect to the urgency of the situation requiring this extraordinary use of the exemption.

Finally, EPA's use of the "good cause" exemption is fatally flawed given that the agency's claim of a sudden "urgent" situation can be attributed to its own delay in taking action earlier. *U.S. v Rainbow Family*, 695 F.Supp. 294, 306 (internal cites omitted) ("where the failure to offer a proposed rule for notice and comment may be attributed to the agency's own dilatory tactics, whether intentional or not, this is a 'decisive factor' in rejecting the agency's claim of 'good cause'"); *NRDC v. EPA*, 683 F.2d 752, 765 (3rd Cir. 1982) ("the imminence of a deadline or the 'urgent need for action' is not sufficient to constitute 'good cause' within the meaning of the APA, where it would have been possible to comply with both the APA and with the statutory deadline"). Here, EPA has offered no explanation for its failure to issue the Interim NCP Rule for notice and comment several months ago in compliance with the CAA and APA. Indeed, as explained above, EPA could have reasonably foreseen the need for such a rule in early 2009, when it became apparent that one

manufacturer would not be able to certify its 2010 engines at the more stringent NOx levels. Such delay is fatal to an agency's claim of good cause. *See Envl. Defense Fund v. EPA*, 716 F.2d 915, 920-21 (D.C. Cir. 1983) (internal cites omitted)("'[T]he imminence of the deadline' permits an agency to avoid APA procedures 'only in exceptional circumstances.' ... Otherwise, an agency ... could simply wait until the eve of a[n] ... administrative deadline, then raise up the 'good cause' banner and promulgate rules without following APA procedures.")

B. EPA Has Failed To Demonstrate the Existence of a True Technological Laggard

As EPA acknowledges, to allow the use of NCPs to avoid compliance with a more stringent standard, the Agency must make a determination that a "technological laggard" exists. Interim NCP Rule at 4; 50 *Fed. Reg.* 35374 (Aug. 30, 1985). Moreover, a technological laggard is "a manufacturer who cannot meet a particular emission standard due to technological (not economic) difficulties." *Id.* The only evidence EPA supplies in support of its finding that a technological laggard exists in this case, however, is speculation that an unnamed manufacturer who previously used emissions credits to comply with the current NOx standard has yet to certify an engine family without the use of credits and may run out of credits sometime in 2012. Interim NCP Rule at 9. There is no evidence that the manufacturer actually requested an NCP and there is no evidence that the manufacturer is truly unable to comply based solely on technological, as opposed to economic, reasons.

In fact (although we know the manufacturer to be Navistar), EPA does not even identify the only manufacturer that it claims is in need of credits, never mind providing any analysis of the manufacturer's technological capabilities. There simply is no basis within the Interim NCP Rule to conclude that Navistar is a true technological laggard, as opposed to economic laggard. As explained above, all the evidence available demonstrates that, notwithstanding its use of SCR in countries other than the U.S., Navistar made an economic decision not to use a technology that was equally available to it as it was to all other SCR manufacturers. Having made the wrong economic decision, Navistar apparently now seeks to exempt itself from the standards by claiming to be a company that lacks the resources and technical capability to comply (i.e., a true technological laggard). As would have been demonstrated had EPA undertaken proper notice and comment rulemaking, and will be demonstrated upon judicial review, this simply is not the case.

C. EPA's NCP Is Set Arbitrarily Low

Even if a technological laggard existed (which it does not), EPA's Interim NCP Rule is fatally flawed insofar as it establishes a penalty that is arbitrary and capricious and does not reflect adequate consideration of the evidence supplied to the agency or otherwise

available to it. As noted above, the penalty in the Interim NCP Rule is only a small fraction of the last NCP established by EPA for a similar level of noncompliance. The reason for this is that EPA fails to consider numerous costs faced by SCR manufacturers in the development and use of technology that enabled them to comply with the 0.2 g/bhp-hr standard, notwithstanding that information regarding these costs was supplied to EPA. Again, EPA's failure to properly address the full magnitude of the costs, and resulting competitive disadvantage, likely could have been avoided had the Agency not deprived manufacturers and the public of their full opportunity to comment on the proposed rule. Such comments would readily demonstrate the flaws in EPA's NCP, as well as how it fails to both adequately remedy the competitive disadvantage created by granting Navistar an inexpensive license to grossly exceed emissions standards, and to provide incentive for Navistar to comply. As a result, Mack is likely to succeed on the merits of its challenge to the level of NCP set by EPA.

2. Mack Is Likely to Suffer Irreparable Harm Absent a Stay

Unless the Interim NCP Rule is stayed, it will take effect upon publication in the *Federal Register*, thereby giving Navistar the full benefit of the rule while simultaneously depriving Mack and the rest of the public of the opportunity to demonstrate and seek to remedy the fundamental flaws in the rule. Once Navistar is granted one or more certificates of conformity based on paying insufficient, minimal penalties, it will have free reign to sell engines with emissions that are more than twice the level of its competitors, and reap the competitive benefit from doing so.

As noted, Mack contends that EPA does not have a valid reason to promulgate NCPs under the circumstances presented here. Navistar is not a 'technological laggard' and does not qualify for NCPs under CAA §206(g). This is one of many comments that Mack would have presented to EPA had it been given the opportunity. By failing to provide notice and comment on the Interim NCP Rule, and by making it effective upon publication in the *Federal Register*, EPA has deprived Mack of its right to participate in the rulemaking process. This, alone, is sufficient to demonstrate that Mack has suffered irreparable harm as a result of EPA's Interim NCP Rule. *Northern Mariana Island v. United States*, 686 F. Supp.2d 7, 17 (D.D.C. 2009) *quoting Sugar Cane Growers Cooperative of Florida v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002) ("A party experiences actionable harm when 'depriv[ed] of a procedural protection to which he is entitled' under the APA.")

Furthermore, by failing to undertake notice and comment rulemaking, EPA attempts to provide NCPs to Navistar in the very near term – perhaps as soon as March 2012. Under the Interim Final NCP rule, Navistar will have certified engines with NCPs and will have continued its marketing and sale of engines that do not comply with actual limits, while

simultaneously engaging in its ongoing campaign to disparage SCR technology. In other words, Navistar will use its opportunity to exceed applicable emission limits to gain customer goodwill, and more importantly, to impair the customer goodwill of its competitors. *Robert Bosch LLC v. Pylon Manufacturing Corp*, 659 F.3d 1142, 1155 (Fed.Cir. 2011) (Finding that lost market share and lost business opportunities can result in irreparable harm for which monetary damages alone cannot fully compensate.) If Mack is right, and EPA or a court later agrees that the facts fail to provide a legal basis for the NCP (i.e., there is no technological laggard), Mack cannot recoup its lost customers or lost sales.

3. Neither EPA nor Navistar Will Be Irreparably Harmed By Stay

It is clear from the outset that staying the Interim NCP Rule will have no detrimental impact on EPA. The stay does not affect its ability to carry out its intended mission and purpose, or otherwise harm the Agency. EPA contends that the Interim NCP is necessary to allow Navistar to sell heavy heavy-duty engines in 2012 in the U.S. Interim NCP Rule at 6. However, given that the Interim NCP Rule is neither justified by an appropriate finding of a technological laggard, nor sets the NCP at a level that complies with the statutory mandate to eliminate competitive impacts and ensure prompt compliance with applicable standards, it is likely that it will be vacated upon appeal. If that is the case, Navistar ultimately will not be able to sell engines produced using the NCP. If the Interim NCP Rule is reversed, that action will void Navistar's certificates of conformity issued using NCPs under the rule, and engines sold under those voided certificates will be noncompliant and subject to recall. As such, Navistar's reliance on the Interim NCP Rule is tenuous, as it would be imprudent to inconvenience its customers by selling NCP engines that must later be recalled. Navistar will have available options of either selling its SCR engines in the U.S., or waiting until the NPRM undergoes proper notice and comment and EPA finalizes the NCP.

In addition, EPA notes that Navistar has credits available to it that would allow for continued certification and sale of engines in the United States for some period of time in 2012. Interim NCP Rule at 6. Navistar, and presumably EPA, were thus fully aware of the company's available credit balance, but inexplicably delayed an NCP rule until the last minute. Neither Navistar nor EPA can justify inflicting irreparable harm on Mack and other members of the public based solely on the agency's negligent failure to undertake an NCP ruling early enough to prevent Navistar's depletion of credits before the properly noticed and commented final NCP rule would take effect. In light of this, the balance of harms weighs in favor of Mack and supports a stay of the Interim NCP Rule.

4. Staying the Rule Is In the Public Interest

If the Interim NCP Rule is allowed to proceed, Navistar will be permitted to begin certifying and selling engines with NOx emissions that are more than double the applicable emissions standard. Moreover, it will be able to do so without paying any meaningful penalty. The penalty, as set in the Interim NCP Rule, will not add sufficient cost to Navistar's engines to dissuade customers from purchasing Navistar vehicles, and as such, it provides little to no incentive for Navistar to engineer engines that comply with the standard. The result will be the production and sale of thousands of engines that both pollute more and undermine the market for cleaner SCR engines. Preventing this result is clearly in the public interest.

Conclusion

For the foregoing reasons, Mack respectfully requests that EPA stay the Interim NCP Rule pending review, pursuant to FRAP 18(a).

Sincerely,

Julie R. Domike
Alec C. Zacaroli
Counsel for Mack Trucks, Inc. and Volvo Group North America, LLC